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No. 107

In the Supreme Court of the United States

OCTOBER TERM, 1943

KEASBY & MATTHEW COMPANY, PETITIONER

WALTER J. RUTHERFORD, COMMISSIONER OF INTERNAL  
REVENUE,

ON PETITION FOR A WRIT OF HABEAS CORPUS  
STATE SUPREME COURT OF TEXAS, PETITIONER  
CIRCUIT

FILED FOR THE RECORD



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# In the Supreme Court of the United States

OCTOBER TERM, 1943

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No. 107

KEASBEY & MATTISON COMPANY, PETITIONER

v.

WALTER J. ROTHENSIES, COLLECTOR OF INTERNAL  
REVENUE

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE THIRD  
CIRCUIT

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BRIEF FOR THE RESPONDENT IN OPPOSITION

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## OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 23-31) is reported at 133 F. 2d 894. The findings of fact, conclusions of law, and opinion of the District Court (R. 18-20) are unreported.

## JURISDICTION

The judgment of the Circuit Court of Appeals was entered February 17, 1943. (R. 31.) A petition for rehearing was denied March 17, 1943. (R. 31, 32.) The petition for a writ of certiorari was filed on June 17, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of



the Judicial Code, as amended by the Act of February 13, 1925.

#### QUESTION PRESENTED

Whether the taxpayer is entitled to a credit against its federal income tax for taxes paid the Province of Quebec under the Quebec Mining Act. The answer depends upon whether the Canadian tax was an "income tax" within the meaning of Sections 31 and 131 (a) (1) of the Revenue Act of 1936.

#### STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 6-12.

#### STATEMENT

The taxpayer, during its fiscal year ended March 31, 1937, paid the Province of Quebec, Canada, \$10,072.26 in taxes under the provisions of the Quebec Mining Act (Appendix, *infra*). The taxpayer included this amount in the credit claimed against its federal income tax for "income \* \* \* taxes paid \* \* \* during the taxable year to any foreign country" under Sections 31 and 131 of the Revenue Act of 1936, *infra*. The Commissioner disallowed the credit to the extent of the payment under the Quebec Mining Act, allowing that amount as a deduction from gross income under Section 23 (c) of the Act. (R. 6, 7-8, 18.)

A deficiency was assessed accordingly and upon payment the taxpayer filed a claim for refund



which was denied. (R. 8-9.) This suit was then brought. (R. 2.) The District Court, in its findings of fact, analyzed the Quebec Mining Act and found that it was not an income tax. It therefore concluded that the credit was properly disallowed and that the taxpayer was not entitled to recover. (R. 18-19.) The Circuit Court of Appeals affirmed on the grounds that the tax was an excise tax on the mining privilege and not an income tax. (R. 23-31.)

#### ARGUMENT

The decision below is correct. The taxpayer's right to credit the Canadian tax against its federal income tax, rather than deducting it from gross income,<sup>1</sup> depended upon a showing that it was a foreign "income" tax within the meaning of Sections 23 (c) (2), 31 and 131 (a) (1) of the statute. It is not disputed that under *Biddle v. Commissioner*, 302 U. S. 573, the determination must rest upon the criteria of an income tax under our laws.

The Canadian statute provides that every mine in the Province of Quebec shall be liable for a duty measured by a percentage of its "annual profits." The "annual profits" are determined by deducting from the "gross value of the

<sup>1</sup> Since the Commissioner permitted the taxpayer to deduct the Canadian tax from gross income under Section 23 (c) (2), it was not deprived of tax benefit under the Federal statute with respect to its payment of the Canadian tax. However, it seeks more than a mere deduction; it seeks to credit the Canadian tax against its liability under the Federal statute.



year's output, sold, utilized or shipped during the year" enumerated "costs of operation and expenses." The "gross value of the year's output" is defined to mean "the real value of the ore and minerals at the ruling market prices at the time of their sale or of their use."<sup>2</sup> Sec. 17. Thus the levy is measured by the market value of the product of the mine whether or not gain has been realized by actual sale and whether the proceeds of such sales as may have been made are greater or less than the ruling market prices. Our income taxes, however, have always been based upon the amount of realized gain; nothing in any of the cases cited by the taxpayer suggests the contrary. It was that kind of tax to which Sections 31 and 131 (c) of the Act must refer.

The decision is in accord with the applicable administrative ruling. I. T. 2909, XIV-2 Cum. Bull. 136 (1935). Moreover, in considering the question in 1942, Congress amended the credit provisions of the statute to apply to foreign taxes "imposed in lieu of a tax upon income." Whether the tax here is such a tax need not be considered since the amendment applies only to taxable years beginning after December 31, 1941.

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<sup>2</sup> The allowable deductions are restricted to the costs incurred in the mining operation, as distinguished from expenses incident to the general conduct of the business. It is specifically provided that there shall be no allowance or deduction "for depreciation in the value of the mine, by reason of exhaustion or partial exhaustion of minerals, due to the mining thereof." (Sec. 14, Appendix, *infra*.)



Revenue Act of 1942, c. 619, 56 Stat. 957, Section 158. However, the report of the Senate Finance Committee (S. Rep. No. 1631, 77th Cong., 2d Sess., p. 131) stated:

In the interpretation of the term "income tax," the Commissioner, the Board, and the courts have consistently adhered to a concept of income tax rather closely related to our own, and if such foreign tax was not imposed upon a basis corresponding approximately to net income it was not recognized as a basis for such credit. \* \* \*

Congress apparently contemplated no change in the existing rulings except where the amendment was specifically applicable.

There is no conflict among the circuits.

#### CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1943.